

No. 77-1053

Supreme Court, U. S.

FILED

JAN 25 1978

MICHAEL RODAK, JR., CLERK

IN THE SUPREME COURT
OF THE UNITED STATES

CAROL NUTTER,

Petitioner,

vs.

*PERFECTO TORREZ, d/b/a
PERFECTO PLUMBING AND
SEWER SERVICE, INC., and
WILLIAM FURNACE COMPANY,*

Respondents

REVISED APPENDICES TO PETITIONER'S
"PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF THE STATE OF KANSAS"

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REVISED APPENDICES TO PETITIONER'S
"PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF THE STATE OF KANSAS"

The "Petition For Writ Of Certiorari To The Supreme Court Of The State Of Kansas" was previously filed (with copies going to opposing counsel) on the 23rd day of January, 1978.

The following is a revised appendices to said "Petition For Writ Of Certiorari To The Supreme Court Of The State Of Kansas".

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Appendix "A"

NOT DESIGNATED FOR PUBLICATION

No. 48,534

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

CAROL NUTTER,
Appellant,

v.

PERFECTO TORREZ,
d/b/a PERFECTOR PLUMBING AND SEWER SERVICE, INC.,
and WILLIAMS FURNACE COMPANY,
Appellees.

MEMORANDUM OPINION

Appeal from Shawnee district
court, division No. 1; WILLIAM RANDOLPH
CARPENTER, judge. Opinion filed July 22,
1977. Affirmed.

Harold E. Doherty, of Topeka,
for the appellant.

George Farrell, Jr. and David L.
McLane, of Topeka, for Perfecto Torrez,
appellee.

Michael J. Schenk and Herbert A.
Marshall, of Marshall, Hawks, McKinney
& Hendrix of Topeka, for Williams Furnace
Company, appellee.

Before SWINEHART, P.J., REES
and PARKS, JJ.

PARKS, J.: The plaintiff, Carol
Nutter, mother of the decedent, Daina
Torbert Nutter, filed a wrongful death
action against the defendant Williams
Furnace Company, the manufacturer of a
furnace, and the defendant Perfecto Torrez

d/b/a Perfecto Plumbing and Sewer Service, Inc., who allegedly installed the furnace in plaintiff's home. The plaintiff alleged that the defendants were negligent in the manufacture and installation of the furnace and that the cause of her son's death was carbon monoxide poisoning.

The pertinent facts are: On the morning of January 17, 1973, Carol Nutter found her son dead in his bed. Dr. Robert Parman, the family pediatrician, was called to the home and pronounced the child dead. Dr. Parman questioned the family in reference to possible drug ingestion, trauma or carbon monoxide poisoning, but as far as the family knew at the time, there was no problems involved in any of these areas. Dr. Parman raised the question about carbon monoxide poisoning because he noticed a wall

furnace in the room where the child had been sleeping. Dr. Parman expressed his concern to the county coroner, Dr. Hauman, who performed an autopsy the following day. The autopsy revealed congestion and condensation of both lungs suggestive of viral pneumonitis. The microscopic examination revealed changes of influenzal pneumonia. Dr. Hauman commented in his autopsy report that the gross findings and the gross appearance of the blood were incompatible with carbon monoxide poisoning and therefore no chemical tests were performed on the blood.

Both defendants filed a motion for summary judgment. The trial court sustained the motions, stating in part:

"The uncontroverted medical evidence of defendants discloses that there is no causal connection between alleged conduct of defendants and the death of the child in question. Plaintiff has failed to show any competent medical evidence which would establish her claim and contradict the medical discovery of said defendants."

Plaintiff appeals from this adverse ruling.

We will first consider plaintiff's contention that the court erred in holding as a matter of law that there was no question of fact as to the proximate cause of the child's death.

Where the sole question presented is one of law, a final determination may be had on a motion for summary judgment. Wagner v. Mahaffey, 195 Kan. 586, 408 P.2d 602. A motion for summary judgment should be sustained only where there is no genuine issue of material fact, and a party is entitled to judgment as a matter of law. Mildfelt v. Lair, 221 Kan. 557, 559, 561 P.2d 805; Harold v. Harold, 218 Kan. 284, 543 P.2d 1019.

It may be said that an issue of fact is not genuine unless it has legal controlling force as to a controlling issue. A disputed question of fact which is immaterial to the issues does not preclude a summary judgment. If the disputed fact, however resolved, could not affect the judgment, it does not present a genuine issue of a material fact. It has been said that before

summary judgment is granted the court must be convinced that the issue is not genuine, or that there are only immaterial or imaginary factual issues. Sacrist v.

Turley, 196 Kan. 572, 412 P.2d 976.

Here, we have the coroner's report giving the final diagnosis and cause of death as influenzal pneumonia; and a clarification of that diagnosis that since the gross findings and appearance of the blood were incompatible with carbon monoxide poisoning, no chemical tests were performed. The only medical expert designated by plaintiff in her answer to interrogatories as one who would testify contrary to the coroner's report, was Dr. Parman. However, Dr. Parman stated that he had no opinion of the cause of

death which he could express with any degree of medical certainty other than that listed in the coroner's report.

Inasmuch as the cause of death is the gravamen of plaintiff's claim, we agree with the trial court that there is no genuine issue of material fact as to either the causal connection between the acts of the defendants and the death of the child, or the cause of death itself.

There was no indication of evidence reaching the degree of reasonable medical probability that the death resulted from carbon monoxide poisoning. Nunez v.

Wilson, 211 Kan. 443, 507 P.2d 329.

The coroner's report was the only medical evidence which could be expressed with any degree of medical certainty.

Accordingly, we must conclude that the trial court was correct in granting its order of summary judgment.

Plaintiff next contends that the trial court erred in refusing to reconsider its previous ruling. The following excerpt is taken from the court's letter in response to an inquiry by plaintiff's counsel concerning the Memorandum Decision filed

May 28, 1976:

"It should be noted that the Court carefully considered plaintiff's memorandum and correspondence attached thereto, as well as the arguments of counsel. The Court concluded as set forth in the Memorandum Decision that the previous

ruling sustaining the defendants' motion for summary judgment should not be disturbed."

In our opinion this statement disposes of the second statement of points raised by the plaintiff.

The judgment is affirmed.

IN THE SUPREME COURT
OF THE STATE OF KANSAS

No. 48,534

CAROL NUTTER,
Appellant,

Appendix "B"

v.

PERFECTO TORREZ, d/b/a PERFECTO
PLUMBING and SEWER SERVICE,
INCORPORATED, and WILLIAM FURNACE
COMPANY,
Appellees.

O R D E R

The petition for review in the
above captioned case is considered and

denied. The opinion of the Court of Appeals filed July 22, 1977, is approved.

Dated September 8, 1977.

For the entire court.

/s/ David Prager

Justice.

Appendix "C"

IN THE SUPREME COURT
OF THE STATE OF KANSAS

Carol Nutter, Appellant,

v.

Perfecto Torrz, d/b/a Perfecto
Plumbing and Sewer Service, Inc.,
et al, Appellees.

No. 48,534

Petition for reconsideration DENIED.

Yours very truly,

LEWIS C. CARTER
Clerk, Supreme Court

Date: October 26, 1977

You are hereby notified of the following
action taken in the above entitled case:

Petition for reconsideration of order
denying Nutter's Petition for Review.

THE LATTIMORE-FINK LABORATORIES, INC.
A DAMON LABORATORY 115 WEST CRANE
TOPEKA, KANSAS 66603

September 30, 1977

Mrs. Carol Nutter
1422 Munson Street
Topeka, Kansas

Appendix "D"

Dear Mrs. Nutter:

On reviewing the circumstances surrounding the death of your son Daina Torbert Nutter, on January 17, 1973, and reviewing the Gross Description and Microscopic Sections of the Autopsy, I find it more probable that he died as a result of carbon monoxide and gas inhalation, rather than viral pneumonitis, as was indicated on the Death Certificate.

The sections of the lungs show marked edema along with an area of hemorrhage with practically no inflammation present. With a viral pneumonitis, I would expect to find at least a mild inflammatory infiltrate.

Therefore, I will revise the Autopsy Diagnosis as well as the Death Certificate.

Yours truly,

/s/ W. Wike Scamman, M.D.
W. Wike Scamman, M.D.,
Coroner

LATTIMORE-FINK LABORATORIES, INC.

WWS:et

Appendix "E"

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IN THE SUPREME COURT
OF THE STATE OF KANSAS

No. 48,534

CAROL NUTTER,
Appellant,

v.

PERFECTO TORREZ, d/b/a PERFECTO
PLUMBING AND SEWER SERVICE,
INCORPORATED, and WILLIAM FURNACE
COMPANY,
Appellees.

A F F I D A V I T

STATE OF KANSAS :
:SS
COUNTY OF SHAWNEE:

The undersigned, of lawful age,
and being first duly sworn upon his
oath, deposes and says:

1. That he is a medical
doctor and coroner;
2. That he recently has
reviewed the circumstances surrounding
the death of Daina Torbert Nutter on
January 17, 1973, and in so doing has
reviewed the Gross Description and Micro-
scopic Sections of the Autopsy performed
on Daina Torbert Nutter, and based on
such review his opinion is that it is more
probable that Daina died as a result of
carbon monoxide and gas inhalation, rather
than viral pneumonitis, as is indicated
on the Death Certificate.

3. The medical reason for his opinion is that the lungs showed marked edema along with an area of hemorrhage with practically no inflammation present.

Had there been a viral pneumonitis, there would have been at least a mild inflammatory infiltrate, which there was not.

4. That because of his opinion and review of the records as described above, he will revise the Autopsy Diagnosis as well as the Death Certificate to reflect the above.

5. Further affiant saith not.

Subscribed and sworn to before me this 4th day of October, 1977.

/s/Shirley L. Phelps
Notary Public

(Seal)

My Commission Expires:

December 24, 1979

/s/ W. Wike Scamman, M.D.
W. WIKE SCAMMAN, M.D.
Coroner

IN THE SUPREME COURT
OF THE STATE OF KANSAS

No. 48,534

CAROL NUTTER,
Appellant,

v.

Appendix "F"

PERFECTO TORREZ, d/b/a PERFECTO
PLUMBING and SEWER SERVICE,
INCORPORATED, and WILLIAM FURNACE
COMPANY,
Appellees.

PETITION FOR RECONSIDERATION
OF ORDER DENYING NUTTER'S
PETITION FOR REVIEW

Comes now the appellant above-named, Carol Nutter, and moves this court to reconsider its order of September 8, 1977 whereby Nutter's Petition for Review was denied.

In support hereof, appellant shows the court that summary judgment was granted in this action at the trial level solely because of an uncontested coroner's report and death certificate, which report indicated that Nutter's deceased son could not possibly have died from gas inhalation. Likewise, the Kansas Court of Appeals affirmed that summary judgment because of that uncontested report and certificate. Your petitioner further assumes that this court declined to grant review of this matter because of that uncontested report.

Appellant now shows this court that a recent report from W. Wike Scamman, M.D., Coroner, has reviewed certain portions of the autopsy performed on Nutter's deceased son, and based on that review, finds it "more probable that he (the deceased son) died as a result of carbon monoxide and gas inhalation, rather than viral pneumonitis, as was indicated on the Death Certificate." Because of Dr. Scamman's review of the Death Certificate, and his opinion as to its error, he is going to revise the Autopsy Diagnosis as well as the Death Certificate. (See attached letter to Dr. Scamman.) Dr. Scamman has also executed an affidavit in this regard, which is attached hereto and incorporated herein by reference.

Thus, the public records indicating the cause of your appellant's son's death will indicate that the death was most probably caused by carbon monoxide and gas inhalation. It would be gross injustice to deny Mrs. Nutter her "day in court" in this action because of an error on the part of a public official. It obviously is unjust to say to this appellant that she does not have the right to a jury trial because of a death certificate, when that exact same death certificate has been revised and amended as a matter of public record.

WHEREFORE, your appellant prays that this court reconsider its decision of September 8, 1977 whereby appellant's Petition for Review was denied, and that this court enter a judgment reversing

the trial court's granting of summary judgment and remanding this case to the District Court level for jury trial.

Respectfully submitted,

FRED W. PHELPS - CHARTERED
3701 West Twelfth Street
Post Office Box 4391
Topeka, Kansas 66604
913/273-1420

By: /s/ Fred W. Phelps, Jr.
FRED W. PHELPS, Jr.
Attorney for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that a conformed copy of the above and foregoing "Petition for Reconsideration of Order Denying Nutter's Petition for Review" was regularly mailed this 4th day of October, 1977, to:

James E. Benfer, Esq.
1400 Topeka Boulevard
Topeka, Kansas 66612

Herbert A. Marshall, Esq.
and
Michael J. Schenk, Esq.
810 Mefchants National Bank
Building
Topeka, Kansas 66612

By: /s/ Fred W. Phelps, Jr.
FRED W. PHELPS, Jr.
Attorney for Plaintiff.

CERTIFICATE OF SERVICE

Pursuant to Rule 33 of the Rules of the United States Supreme Court, the undersigned hereby certifies and indorses that three copies of the above and foregoing Revised Appendices to Petitioner's Petition for Writ of Certiorari to the Supreme Court of Kansas was served on counsel for all parties concerned, by placing such copies in a United States mail box, with first class postage prepaid, addressed to counsel of record at their post office address as follows:

James Benfer, Esq.
1400 Topeka Boulevard
Post Office Box 2217
Topeka, Kansas 66601,
Attorney for Perfecto
Torrez, d/b/a Perfecto
Plumbing and Sewer Service, Incorporated; and,

Michael J. Schenk, Esq.
810 Merchants National
Bank Building,
Topeka, Kansas 66612,
Attorney for William
Furnace Company.

Such certification is made
pursuant to Rule 33(1) and 3(b).

Certification is further made
that such mailing occurred on the 23rd
day of January, 1978. Further, pursuant to
Rule 21(3) of the Rules of this Court,
forty (40) copies of this Revised Appen-
dices to Petitioner's Petition for Writ of
Certiorari to the Supreme Court of Kansas
were mailed, air mail, special delivery,
postage prepaid, to the Clerk of the
United States Supreme Court, on the 10
day of February, 1978.

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